Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1979

NO. 80-246

COMMUNITY GRAIN, INC.,
Petitioner,

vs.

COOK INDUSTRIES, INC.,
Respondent.

Response to Application
for Writ of Certiorari

JOHN HUFFAKER

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ATTORNEYS FOR RESPONDENT

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I N D E X

	PAGE
LIST OF AUTHORITIES	ii
STATEMENT OF ISSUE	1
STATEMENT OF THE CASE	1
A. Course of Proceedings . .	1
B. Statement of Facts . . .	2
ARGUMENT AND AUTHORITIES	4
CONCLUSION	7
CERTIFICATE OF SERVICE	8

LIST OF AUTHORITIES

PAGE

Cases:

Appalachian Power Company v. American Institute of Certified Public Accountants, 4 L.Ed.2d 30, 80 S. Ct. 16 (1959) (Brennan, J., in chambers) 6

Cook Industries, Inc. v. Community Grain, Inc., 614 F.2d 978 2

Steele v. General Mills, Inc., 329 U.S. 433, 91 L.Ed. 402, 67 S. Ct. 439 (1947) 6

United States v. Durham Lumber Co., 363 U.S. 522, 4 L.Ed.2d 1371, 80 S. Ct. 1282 (1960) . . . 6

Rules:

U. S. Sup. Ct. Rule 19(1)(b), 28 U.S.C.A. (1977) 5

Treatises:

1A Corbin on Contracts § 259 (1963) 5

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STATEMENT OF ISSUE

WHETHER THE UNITED STATES SUPREME COURT SHOULD ISSUE ITS WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE DISTRICT AND CIRCUIT COURTS BELOW, WITH RESPECT TO THEIR INTERPRETATION OF TEXAS LAW AS APPLIED TO CONTRACTS FOR FUTURE DELIVERY OF GRAIN.

STATEMENT OF THE CASE

A. Course of Proceedings.

The application of COMMUNITY GRAIN, INC. for writ of certiorari seeks relief

from the Judgment On Jury Verdict of the United States District Court for the Northern District of Texas dated November 11, 1977. The trial court's judgment was affirmed by the United States Court of Appeals for the Fifth Circuit in an opinion dated March 31, 1980, Cook Industries, Inc. v. Community Grain, Inc., 614 F.2d 978. The motion for rehearing of the applicant, Community Grain, Inc., was denied by the Fifth Circuit on May 16, 1980. This is a diversity case.

B. Statement of Facts.

The Respondent, COOK INDUSTRIES, INC., in the courts below, has recovered a judgment for damages for breach of contract by the applicant. The contract in question was made in July, 1973. Under the contract, Cook was the purchaser and Community was the seller. As is common in

the trading of grain, three separate writings were generated to memorialize the sale. The purchaser, the seller and the broker each issued a written memoranda. Although each contract used slightly different verbiage, all three embodied consistent approaches with respect to the line of delivery. The grain in question was to be deliverable during the months of October, November or December, 1973, but the buyer was given the express right to "carry" or leave the grain in storage after January 1, 1974, at the rate of one cent per hundredweight for each fifteen (15) days following January 1, 1974. The Petitioner, Community Grain, incorrectly states that the option in question in the suit was an option to purchase. The purchase contract was final in July, 1973. The option in question dealt with the purchaser's option to take delivery by January 1 or to leave the grain in storage.

In the trial below, the trade practices in the Texas grain industry and the local trade rules were presented in the presentation of evidence. After having heard such evidence, the jury was asked whether Cook exercised its option to store and the jury answered affirmatively. The Petitioner apparently attacks the legal validity of a judgment founded, in part, on this issue.

ARGUMENT AND AUTHORITIES

The Court should not grant a writ of certiorari in this case.

Supreme Court Rule 19 suggests the factors to be considered by the Court in exercising its discretion. No ground stated in the rule seems to include the situation here. Only one statement in the Rule is even arguably applicable, but the question raised by the applicant hardly

seems to rise to the level of ". . . an important state or teritorial question." U.S. Sup. Ct. Rule 19(1)(b), 28 U.S.C.A. (1977). Even if the question were deemed sufficiently "important," the decisions of the courts below are not "in conflict with applicable state or territorial law." Id.

The applicant suggests that the right to leave grain in storage under the contracts was an "option" and could not be exercised by silence. Although the right in the contracts is referred to as an "option to carry," it is not a true "option contract" in the sense of being an open offer requiring an acceptance to form a future contract, it is, instead a presently granted right of choice contained within the contract. See 1A Corbin on Contracts § 259 (1963). For this reason, the cases from Texas courts cited by the applicant as decisions in conflict with the lower

courts' decisions are actually not applicable to this case. Each of the opinions cited by the applicant are interpretations of rights under true option contracts for the purchase of real estate interests.

Finally, for the Court to grant its writ of certiorari in this case would be inconsistent with its long-standing tradition of not granting the writ to question the consistent interpretation of state law by lower district and appellate courts. E.g., United States v. Durham Lumber Co., 363 U.S. 522, 4 L.Ed.2d 1371, 80 S. Ct. 1282 (1960); Appalachian Power Company v. American Institute of Certified Public Accountants, 4 L.Ed.2d 30, 80 S. Ct. 16 (1959) (Brennan, J., in chambers); Steele v. General Mills, Inc., 329 U.S. 433, 91 L.Ed. 402, 67 S. Ct. 439 (1947).

CONCLUSION

The Respondent, COOK INDUSTRIES, INC., prays the Court to deny the Application for Writ of Certiorari.

Respectfully submitted,

GIBSON, OCHSNER & ADKINS
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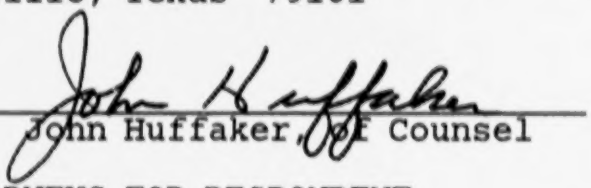
By 
John Huffaker, Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 1980, a copy of the above and foregoing Response to Application for Writ of Certiorari was mailed postage prepaid to Mr. Raymond C. Caballero, Attorney for Petitioner, Pearson, Caballero & Warach, 1610 State National Plaza, El Paso, Texas 79901. I further certify that all parties required to be served have been served.

John Huffaker

John Huffaker